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May 17, 1983

Mr. Edwin S. Narus, Sr., Chairman
New Hampshire Board of Auctioneers
c/o Secretary of State
State House
Concord, New Hampshire 03301

Dear Mr. Narus:

By letter dated May 4, 1983, the Board requested an opinion to answer the following questions:

1. Does a municipality have the authority to prohibit a licensed auctioneer from conducting a Sunday auction in that municipality?

2. May a municipality charge a licensed auctioneer a separate license fee in addition to that charged by the State for conducting an auction within that municipality?

3. Would a licensed auctioneer who violated a municipal ordinance prohibiting Sunday auctions or who failed to pay the license fee required by the municipality be subject to disciplinary proceedings under RSA 311-B:11, II(c)?

It is our informal opinion that a municipality does have the authority to prohibit auctions on Sunday provided such a prohibition is accomplished by a properly adopted by-law or ordinance that is not arbitrary or discriminatory. It is also our opinion that a municipality may charge a separate license fee for an auction conducted within its boundaries. Moreover, an auctioneer who violated a municipal prohibition on Sunday auctions or conducted or attempted to conduct an auction without paying a municipal license fee could be subject to disciplinary proceedings under RSA 311-B:11.



The state statutes governing Sunday sales, RSA 332-D:1-7, are derived almost verbatim from the former RSA 578, which was repealed in 1973. The New Hampshire Supreme Court described the intent of these statutes:

"Clearly the legislative scheme is to leave the control of Sunday retail business activity to the option of cities and towns and to provide a statewide rule to apply in the absence of local regulation." City of Keene v. Gerry's Cash Market, Inc., 113 N.H. 165, 168 (1973).

RSA 332-D:1 and 2 generally prohibit anyone, subject to certain limitations, from doing any work or selling merchandise on Sunday. RSA 332-D:4, however, grants municipalities the authority to permit or regulate business and recreation on Sunday, also subject to certain limitations, provided any such municipality follows certain procedures when undertaking such action.

Although this statutory scheme may result in local differences in the type of activities that are prohibited or in the way in which they are regulated, the legislature has chosen to give municipalities regulatory power over Sunday activities. As the New Hampshire Supreme Court has stated:

"The fact that this will result in some localities permitting the sale of commodities on Sunday in addition to those permitted by RSA 578:4 while other communities will prefer not to do so; and that those localities which permit sales of merchandise may differ among them as to the type of articles permitted to be sold does not in and of itself constitute improper classification and unjust discrimination." State v. Rogers, 105 N.H. 366, 372 (1964).

This is not to say that every municipal ordinance regulating or prohibiting Sunday auctions is constitutional or that the practice of a particular municipality in enforcing an ordinance is not arbitrary or discriminatory. Under the present statutory scheme in New Hampshire, however, it is clear that municipalities have fairly broad authority to control and prohibit certain Sunday activities.

To issue an opinion regarding the constitutionality of a particular municipal ordinance or the manner in which it is enforced, however, is beyond the scope of our duties as legal

counsel to the Board. The issue of the constitutionality of a particular ordinance or practice is best left to the judgment of the court when presented with a particular case or controversy.

On the issue of a separate auctioneer's license fee charged by a municipality in addition to the one charged by the State, RSA 311-B:9 states:

"This chapter shall not be deemed to nullify or prevent a municipal corporation from collecting an additional fee from auctioneers licensed under this statute."

Since the State clearly has the power to delegate to a municipality the authority to charge a license fee and since such authority may run concurrently with the power of the State to charge such a fee, a person, in this case an auctioneer, may be required to pay separate license fees to both the State and a municipality. See 53 C.J.S. Licenses §11 (1948); 51 Am.Jur.2d Licenses and Permits §126 (1970). By enacting both RSA 311-B:3, III, authorizing the Auctioneers Board to establish state license fees, and RSA 311-B:9, authorizing municipal corporations to collect an additional fee, the legislature has clearly exhibited an intent to authorize the charging of both fees and in doing so has acted within the scope of its authority.

In answer to the final question, if a licensed auctioneer were to violate a municipal ordinance prohibiting or regulating auctions on Sundays or requiring the payment of a separate license fee to a municipality, the Board would clearly have the authority to take disciplinary action against the licensee under RSA 311-B:11, II(c). Violation of a municipal ordinance, in our opinion, could, depending upon the circumstances, constitute "unprofessional conduct" or "dishonorable conduct unworthy of, and affecting the practice of the profession." This is not to say that the Board would be required to take action against an auctioneer who violated a city ordinance. Since RSA 311-B:11, I states that the Board "may undertake disciplinary proceedings" for the reasons that are listed, the power to undertake disciplinary action is a discretionary power. According to this statute, the only time the Board is required to suspend an auctioneer's license is when the licensee is found to have:

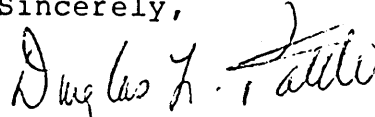
"(a) Allowed his license to be used by another, not an apprentice, in the conduct of an auction; or

(b) Used deceptive practices in the conduct of an auction." RSA 311-B:11, III.

The violation of a municipal ordinance would not necessarily fall under either of these categories.

I trust this opinion has answered your questions. Please let us know if you require anything further.

Sincerely,

A handwritten signature in dark ink, appearing to read "Douglas L. Patch", with a stylized flourish at the end.

Douglas L. Patch
Assistant Attorney General
Division of Legal Counsel

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